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IN THE
COURT OF APPEALS OF INDIANA

BILLY M. BAUGH, SR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 53A01-0612-CR-557
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Marc R. Kellams, Judge
Cause No. 53C02-0411-FC-937

September 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Billy M. Baugh, Sr., appeals his convictions for Rape,[1] a class B felony, Criminal Deviate Conduct,[2] a class B felony, and Criminal Confinement,[3] a class D felony. Baugh contends that his trial counsel was ineffective for failing to object to the absence of a jury instruction on consent and that his convictions for rape and criminal confinement violate double jeopardy. Baugh also takes issue with the sentences imposed by the trial court, arguing that the trial court erred in weighing his prior criminal history as an aggravator and in finding the impact on the victim and the level of injury caused by the crimes as aggravating factors. Finding that Baugh's convictions for rape and criminal confinement violate double jeopardy and finding no other error, we affirm in part, reverse in part, and remand with instructions to vacate Baugh's conviction and sentence for criminal confinement.

FACTS

In early 2006, M.L. worked at the Bloomington Hospital Linen Service, where she met Baugh, who also worked there. M.L. was twenty years old at that time but, because of a mental disability, her mental and social abilities are more akin to an eight- to ten-year-old child. M.L. and forty-four-year-old Baugh began a relationship at work, having lunch together nearly every day. M.L. considered Baugh to be her boyfriend. Baugh's supervisor warned him about M.L.'s mental disability and told him that there was to be no romantic involvement at work. When M.L.'s parents learned about the relationship, they became

[1] Ind. Code § 35-42-4-1.

[2] I.C. § 35-42-4-2.

upset. M.L.'s father talked with Baugh, informed him about M.L.'s mental disabilities, and emphasized that Baugh was old enough to be her father. Notwithstanding Baugh's knowledge of M.L.'s disability, in early March 2006, during their lunch break, he took her to his trailer, where they engaged in kissing and intimate sexual activity.

On March 30, 2006, Baugh again took M.L. to his trailer during their lunch break. They entered the bedroom, where Baugh removed his clothes and undressed M.L. until she was wearing only her panties. They lay on a mattress, and Baugh began kissing M.L. on her lips and her breasts. He then removed her panties, ignoring her attempt to prevent him from doing so. He returned to kissing her lips, pinned her arms above her head, and then squeezed her breasts so hard that it caused her pain. Baugh then performed oral sex on M.L. and engaged in sexual intercourse with her, notwithstanding her repeated cries of "no." Tr. p. 233-36. The intercourse caused her severe pain. After Baugh was finished, he told M.L. not to tell anyone.

Later that day, when M.L. returned home, her mother realized that something was wrong. M.L. eventually admitted that Baugh had forced her to have sex against her will. Her father took her to the hospital, where an examination revealed that she had suffered severe injuries to her vagina, cervix, and breasts. The doctor and nurse who examined her determined that her injuries were the result of forced sex. The doctor testified that he had performed over 3000 pelvic exams during his career, but the degree of M.L.'s injuries was "unique" and "significant" because her cervix was bruised and bleeding, which he had never

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[3] I.C. § 35-42-3-3.

seen before, even in other rape victims. Id. at 179. Usually, when the doctor suspected that sexual assault was the cause of a patient's injuries, he noted "alleged sexual assault" on the chart. Id. at 182. With M.L., for the first time in his career, he "actually [wrote] sexual assault as a diagnosis." Id.

On March 31, 2006, the State charged Baugh with two counts of class B felony rape, two counts of class B felony deviate conduct, and one count of class D felony criminal confinement. Baugh's jury trial commenced on October 17, 2006, and on October 18, 2006, the jury found Baugh guilty of one count of rape, one count of criminal deviate conduct, and criminal confinement, and acquitted him of the remaining charges. On November 14, 2006, the trial court sentenced Baugh to twenty years for rape, twenty years for criminal deviate conduct, and three years for criminal confinement, to be served concurrently. Baugh now appeals.

DISCUSSION AND DECISION

I. Assistance of Trial Counsel

Baugh first argues that he received the ineffective assistance of trial counsel based on his attorney's failure to object to the lack of a consent instruction or offer his own proposed instruction. As we consider this argument, we observe that when evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel's representation fell below an

objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. Id. To establish prejudice, a defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

To prevail on an allegation of ineffective assistance of trial counsel based on a failure to object to jury instructions or a failure to tender proposed instructions, the defendant must establish that if his attorney had made a proper objection or tendered a proper instruction, the trial court would have been required to sustain the objection or give the tendered instruction. Little v. State, 819 N.E.2d 496, 506 (Ind. Ct. App. 2005), trans. denied. Furthermore, even if the attorney performed deficiently, the defendant must still establish that there was a reasonable probability that but for the error, the results of his trial would have been different. Sanders v. State, 764 N.E.2d 705, 714 (Ind. Ct. App. 2002).

For a jury instruction to be warranted and given, it must be a correct statement of the law and supported by evidence in the record. Strong v. State, 591 N.E.2d 1048, 1050 (Ind. Ct. App. 1992). Additionally, the substance of the proffered instruction must not be covered by other instructions given to the jury. Id.

Initially, we observe that Baugh has failed to include a jury instruction on consent that he believes his trial counsel should have tendered. Consequently, he has waived this argument, inasmuch as it is impossible to evaluate the propriety of a nonexistent instruction.

Waiver notwithstanding, we observe that the trial court instructed the jury on the elements of rape and criminal deviate conduct, respectively, as follows:

> Indiana Code 35-42-4-1 in relevant part provides a person who knowingly has sexual intercourse with a member of the opposite sex, when the other person is compelled by force or imminent threat of force commits Rape, a Class B felony. . . . Indiana Code 35-42-4-2 in relevant part provides a person who knowingly causes another person to submit to deviate sexual conduct when the other person is compelled by force or imminent threat of force commits Deviate Sexual Conduct, a class B felony.

Tr. p. 506-07 (emphases added). These instructions correctly advised the jury regarding the material elements of the offenses. Moreover, implicit in the phrase "compelled by force or imminent threat of force," is an assumption that the victim did not consent—she was compelled. Thus, the substance of a consent instruction was covered by the instructions actually given to the jury and, had Baugh's attorney proffered such an instruction, the trial court would have properly declined the request. Baugh has failed to establish, therefore, that his attorney was ineffective for failing to object to the lack of a consent instruction or proffering his own such instruction.

Furthermore, we note the substantial evidence of Baugh's guilt in the record. M.L. testified that the sex acts occurred without her consent, that she told Baugh "no," and that she attempted to resist his actions but he pinned her down. Tr. p. 232-36. Notwithstanding Baugh's testimony to the contrary, the medical evidence corroborated M.L.'s version of

events. Indeed, the examining physician testified that he had never before observed such significant and traumatic injuries resulting from sexual assault. Given this evidence, Baugh has not established that there is a reasonable probability that the inclusion of a consent instruction would have changed the outcome of the trial.

II. Double Jeopardy

Baugh next argues that his dual convictions for rape and criminal confinement violate double jeopardy. Our Supreme Court has outlined a two-part test to determine whether two convictions violate Indiana's double jeopardy provision. Richardson v. State, 717 N.E.2d 32, 49-50 (Ind. 1999). First, we evaluate whether the statutory elements of the crimes are the same. Robinson v. State, 835 N.E.2d 518, 532 (Ind. Ct. App. 2005). Second, we evaluate whether the actual evidence used to convict the defendant of the two crimes is the same. Id. Under the actual evidence test, the appellant must show a reasonable probability that the facts used by the factfinder to establish the essential elements of one offense were also used to establish the essential elements of the second offense. Id. The appellant must show more than a remote or speculative possibility that the same facts were used. Id.

Our Supreme Court has held that "one who commits rape or criminal deviate conduct necessarily 'confines' the victim at least long enough to complete such a forcible crime." Gates v. State, 759 N.E.2d 631, 632 (Ind. 2001). Whether a defendant is entitled to relief depends on "whether the confinement exceeded the bounds of the force used to commit the rape and criminal deviate conduct." Id.

Here, the State presented evidence that Baugh restrained M.L.'s hands by holding them over her head and that he pinned her down while he forced her to have sex and oral sex. There is no evidence that the confinement was "distinct and elevated from the restraint necessary to commit the other charged crimes." Id. We also note that the deputy prosecutor explicitly argued to the jury that the confinement occurred while Baugh held M.L. down and committed rape and criminal deviate conduct. Appellee's Br. p. 13 n.1. Under these circumstances, M.L.'s convictions and sentences for rape and criminal confinement violate double jeopardy. We hereby reverse the trial court's judgment to that extent and remand with instructions to vacate M.L.'s conviction and sentence for criminal confinement.

III. Sentencing

Finally, Baugh argues that the trial court erred in imposing his sentences, contending that the trial court weighed his prior criminal history too heavily and considered improper aggravating factors.

We review challenges to the trial court's sentencing process for an abuse of discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). The trial court may abuse its discretion in the following ways during the sentencing process: (1) by failing to enter a sentencing statement; (2) by entering a sentencing statement that includes reasons not supported by the record; (3) by entering a sentencing statement that omits reasons clearly supported by the record and advanced for consideration; or (4) by entering a sentencing statement that includes reasons that are improper as a matter of law. Id. at 490-91.

If a defendant chooses to challenge the result of the sentencing process—i.e., the sentence itself—then he must do so via Appellate Rule 7(B), which provides that the "[c]ourt may review a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." See Anglemyer, 868 N.E.2d at 491 (holding that because "a trial court [cannot] now be said to have abused its discretion in failing to 'properly weigh'" aggravators and mitigators, if the trial court enters a proper sentencing statement then the only way a defendant can challenge the sentence is via Rule 7(B)). In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Baugh first argues that the trial court afforded too much weight to his prior criminal history. As noted above, however, the Anglemyer court held that defendants are no longer entitled to challenge the weight given to aggravating and mitigating circumstances. 868 N.E.2d at 491. A defendant's criminal history is a proper aggravating factor, Golden v. State, 862 N.E.2d 1212, 1216 (Ind. Ct. App. 2007), trans. denied, and Baugh does not dispute the substance of his record. Thus, this claim fails.

Baugh next contends that the trial court improperly considered "the level of injury" suffered by M.L. as an aggravator. Tr. p. 183. The injury suffered by the victim of an offense is a proper aggravating factor if it was significant and "greater than the elements necessary to prove the commission of the offense." Ind. Code § 35-38-1-7.1(a)(1). Here, as

noted above, the physician who examined M.L. testified that the degree of M.L.'s injuries was "unique" and "significant" because her cervix was bruised and bleeding, which he had never seen before, even in other rape victims. Id. at 179. After examining M.L., for the first time in his career, he "actually [wrote] sexual assault as a diagnosis." Id. at 182. Under these circumstances, we find that this is a proper aggravator that is supported by evidence in the record.

Finally, Baugh argues that the trial court improperly considered the impact of the crimes on M.L. This aggravator is proper under certain circumstances:

> The impact that the victim or the victim's family suffers as a result of a particular offense is generally accounted for in the presumptive sentence. "In order to validly use victim impact evidence [as an aggravating factor], the trial court must explain why the impact in the case at hand exceeds that which is normally associated with the crime."

Hildebrandt v. State, 770 N.E.2d 355, 359 (Ind. Ct. App. 2002) (quoting Simmons v. State, 746 N.E.2d 81, 91 (Ind. Ct. App. 2001)) (internal citations omitted). Even if we assume that trial courts are still required to explain the use of victim impact evidence as an aggravator after Anglemyer—which is not a foregone conclusion—any error here is harmless, inasmuch as it is clear from the record that, given M.L.'s disability, the deleterious effects of these crimes on M.L. and her family are greater than that generally accounted for in the advisory sentence. Consequently, the trial court's use of this aggravator with no accompanying explanation was not reversible error.

As for the result of the sentencing process—the sentences themselves—we turn to an appropriateness analysis pursuant to Rule 7(B). The nature of these offenses is indisputably heinous. Baugh, a forty-four-year-old man, knowingly entered into a relationship with a

twenty-year-old woman who had the mental and social capacity of an eight- to ten-year-old child. As described by the State, Baugh "purposefully chose and groomed" M.L. to be the victim of his crimes. Appellee's Br. p. 15. One day on their lunch break, he took her to his trailer, removed all of her clothing against her will, and forced her to have oral sex and sexual intercourse despite the fact that she repeatedly said "no" and struggled to be free of him. He raped her with such violence that he caused damage and trauma to her cervix to an extent that her treating physician had never before seen in his career.

Turning to Baugh's character, we observe that his prior criminal history consists of convictions for class A misdemeanor and class D felony operating a vehicle while intoxicated, class C misdemeanor false/fictitious registration, misdemeanor domestic battery (committed in Florida),[4] and class A misdemeanor driving while license is suspended. Although Baugh's prior convictions are not as serious as the present offenses, his record shows that he has been in virtually constant trouble with the law since 1991. He did not learn from his past mistakes and it is apparent that he represents a growing danger to society. Given the heinous nature of the offenses and Baugh's character, we find that the concurrent twenty-year sentences imposed by the trial court are not inappropriate.

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions to vacate the conviction and sentence for criminal confinement.

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[4] Baugh committed this crime in Florida in 1997. Although it is unclear from the presentence investigation report, Baugh acknowledges in his brief that he pleaded guilty to this offense. Appellant's Br. p. 18.

BAILEY, J., and VAIDIK, J., concur.